



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

# Memorandum

Subject: **INFORMATION:** Changes to 23 USC 326  
& 327 through Implementation of Sections  
1307 and 1308 of the Fixing America's  
Surface Transportation (FAST) Act

Date:

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In Reply Refer To:  
HEPE

To: All Division Administrators

On December 4, 2015, the President signed into law the *Fixing America's Surface Transportation* (FAST) Act (Pub. L. 114-94). The purpose of this memorandum is to highlight the new statutory provisions in sections 1307 and 1308 of the FAST Act amending the Categorical Exclusion (CE) Assignment and Surface Transportation Project Delivery Programs (23 U.S.C. §§ 326 and 327, respectively). These provisions are effective as of October 1, 2015.

FHWA will ensure that all new agreements or renewed agreements (when existing agreements expire) incorporate these new FAST Act provisions. Because the provisions now apply, FHWA has developed guidance in the form of Question and Answers (Q\A's) to assist assumption States with the new statutory provisions. The attached Q\A's cover:

- **Section 1307 - Changes to the CE Assignment Program**
- **Section 1308 - Changes to the Surface Transportation Project Delivery Program**

Please share this memo and Q\A's with your partners at the State DOT. We will assist with any requests for program technical assistance or training pursuant to these new provisions, with priority given to those States with active assumption programs and those that have waived sovereign immunity. FHWA Resource Center staff is also a source of capacity building assistance. If you have any questions about the implementation of these sections as part of these assignment programs, please contact Owen Lindauer at [Owen.Lindauer@dot.gov](mailto:Owen.Lindauer@dot.gov) or at (202) 366-2655, or Jennifer Mayo at [jennifer.mayo@dot.gov](mailto:jennifer.mayo@dot.gov) or at (202) 366-1523.

**Fixing America's Surface Transportation (FAST) Act (Pub. L. 114-94, Dec. 4, 2015):  
Questions and Answers Related to Implementing Sections 1307 and 1308 of the  
FAST Act  
Federal Highway Administration**

**Section 1307 – Technical Assistance for States**

**Note: This provision does not apply to Programmatic Categorical Exclusion (PCE) Agreements developed between FHWA Division Offices and State DOTs.**

Question 1: What changes did section 1307 of the FAST Act make to 23 U.S.C. 326 (CE Assignment Program)?

Answer 1: Section 1307 of the FAST Act makes two clarifications to the CE Assignment Program: (1) it requires FHWA to provide technical assistance when requested by the Governor of a State (23 U.S.C. § 326(c)(2)); and (2) it details a FHWA-initiated process for termination of a State's participation in the program (23 U.S.C. § 326(d)(1)).

Question 2: What type of assistance may FHWA provide States under the CE Assignment Program pursuant to section 1307?

Answer 2: Section 1307 requires FHWA to provide technical assistance, training or other support, as requested by the Governor of a State, in three areas: (1) assuming responsibility under the CE Assignment Program; (2) developing a CE Assignment Program Memorandum of Understanding (MOU); or (3) addressing a responsibility under the CE Assignment Program in need of corrective action.

Question 3: How should a State request technical assistance under section 1307?

Answer 3: The Governor of a State may request technical assistance, training or other support by writing to the Division Administrator of the FHWA office in that State and describing the type of technical assistance, training or support needed.

Question 4: How will FHWA respond to a request for technical assistance under section 1307?

Answer 4: The FHWA Division Administrator will prepare a written response that acknowledges the request and identifies the FHWA staff that will be responsible for providing the technical assistance, training or support. FHWA staff will contact the State DOT to discuss the next steps in providing assistance. FHWA will give priority to States that have waived or are in the process of waiving sovereign immunity with respect to the environmental review responsibilities that the State has assumed (or is intending to assume) .

Question 5: What is the process section 1307 established for an FHWA-initiated termination of a State's participation in the CE Assignment Program?

Answer 5: Section 1307 establishes that the FHWA may terminate the participation of any State in the CE Assignment Program if it determines that the State is not adequately carrying out the

assigned responsibilities under the MOU. To terminate the State's participation in the CE Assignment Program, the FHWA must: (1) notify the State in writing about FHWA's determination of noncompliance; and (2) provide the State a period of not less than 120 days to take corrective action to comply with the applicable agreement. FHWA will also provide a detailed description of each responsibility in need of corrective action at the request of the Governor of a State. If the 120-day period has passed and the State has not initiated the corrective action(s), or FHWA determines that they are unsatisfactory, FHWA will notify the State with a written notice of termination.

Question 6: How does section 1307 apply to States with existing MOUs?

Answer 6: These provisions also apply in States with existing MOUs entered into pursuant to 23 U.S.C. § 326 prior to FAST Act enactment. Current MOUs do not need to be amended at this time, but when a MOU is due to expire, then the renewed MOU must be updated in compliance with the provisions in FAST Act. If existing MOU States have questions related to new provision applicability, they should consult with the FHWA Office of Project Development and Environmental Review.

### **Section 1308 – Surface Transportation Project Delivery Program**

Question 7: How does section 1308 modify the requirements for a State to provide information to FHWA as part of its responsibilities under 23 U.S.C. § 327 (NEPA Assignment Program)?

Answer 7: Section 1308 clarifies that the written agreement between the State and FHWA under 23 U.S.C. § 327 (NEPA Assignment MOU) shall require a State to provide any information that FHWA "reasonably" considers necessary to ensure that the State is adequately carrying out the assigned responsibilities. A request for information made by FHWA is reasonable if it pertains to FHWA reviewing the performance of the State as required under the NEPA Assignment MOU. FHWA is solely responsible for determining whether a request is reasonable.

Question 8: How does section 1308 change the language in 23 U.S.C. § 327 that describes the effect of assumption on responsibilities assumed by a State?

Answer 8: Section 1308 clarifies that when a State assumes responsibility under the NEPA Assignment Program it is solely responsible and liable for carrying out this program "in lieu of and without further approval of" FHWA. Section 1308 clarifies that project-level NEPA responsibilities assigned to a State do not require FHWA's involvement or approval. Section 1308 does not expand decision-making responsibilities to program-level NEPA issues or non-environmental matters.

Question 9: How does section 1308 affect how FHWA conducts audits of a State in the NEPA Assignment Program?

Answer 9: Section 1308 makes three changes to how FHWA conducts audits: (1) it establishes a time frame of 180 days following the execution of a NEPA Assignment MOU for FHWA to meet with the State to review implementation of the agreement and discuss plans for the first annual audit; (2) it reduces the number of audits from six to four during the first four years of State participation in the program (one audit each year); and (3) it establishes a time period, not to exceed 180 days, for completing each audit.

Question 10: How does section 1308 affect the process to establish an audit team?

Answer 10: The audit team composition remains a determination made solely by FHWA. As part of the required consultation process between FHWA and the State, within 180 days following the execution of a NEPA Assignment MOU, FHWA will identify the members of the audit team and give the State a reasonable opportunity to review and provide comments on the proposed members of the audit team. The State should provide comments within a mutually agreed upon time period to enable FHWA to meet the 180-day timeframe for consultation before initiation of an audit.

Question 11: When does the 180-day period to complete an audit begin and end?

Answer 11: The 180-day time frame begins on the first day the FHWA audit team initiates the audit by conducting interview/project review work with the State. Preliminary work conducted by FHWA and the State to prepare for the audit, such as preparing a work plan, crafting interview questions, making and responding to a pre-audit information requests, or reviewing project files remotely via electronic means, does not trigger the 180-day period. The audit itself takes place both at the State offices and through remote communications during the 180-day period. The audit review period ends on the date of the Federal Register notice with the final audit report.

Question 12: How does section 1308 change the FHWA-initiated termination of a State's participation in the NEPA Assignment Program?

Answer 12: Section 1308 extends the time a State has to take corrective action from a period of a least 30 days to a period of not less than 120 days from the date of notification of noncompliance.

Question 13: What capacity building opportunities are available under this provision?

Answer 13: Under section 1308, FHWA may assist States in developing the capacity to participate in the assignment program. FHWA may also carry out initiatives as appropriate to promote information sharing and collaboration among States participating in the assignment program. These opportunities include, but are not limited to, education, training, and peer exchanges. States should contact FHWA's Office of Project Development and Environmental Review to request assistance. In order to manage workload, priority will be given to those States that have begun the process of waiving sovereign immunity in preparation for assuming assignment responsibilities (23 CFR 773.107(c)).

Question 14: How did the FAST Act change a State's authority to assume responsibilities for locally administered projects under the NEPA Assignment Program?

Answer 14: Section 1308 clarifies that a State participating in the NEPA Assignment Program may, as appropriate and at the request of a local government:

- (1) Exercise such authority on behalf of a local government for a locally administered project; or
- (2) Provide guidance and training on consolidating and minimizing the documentation and environmental analyses necessary for sponsors of a locally administered project to comply with NEPA and any comparable requirements under State law.